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No. 81-119

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

BEVERLY MORROW, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF JANE ELLEN MORROW AND JAMES ANDREW MORROW, AND JOHN PATRICK MORROW, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONERS

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QUESTIONS PRESENTED BY THE GOVERNMENT'S BRIEF IN OPPOSITION

1. Whether the fact that after the administrative hearing in this case, the applicable regulations were amended to provide that claimants for Public Safety Officer's Benefits may reopen the record to respond to evidence received by the hearing officer ex parte, after the hearing, eliminated the violations of the due process rights of petitioners by the LEAA in this case?

2. Whether the "actual practice" of the LEAA prior to these amendments conformed to the requirements of the amended regulations that provided that claimants for Public Safety Officer's Benefits be afforded an opportunity to reopen the record to respond to such evidence?

3. Whether the findings of the pathologist who performed the autopsy contains any opinion on the crucial issue of whether or not the smoke inhalation sustained by Firefighter John Morrow was a "substantial factor" in his death which supports the decision of the LEAA's hearing office to deny Public Safety Officer's Benefits to his widow and dependent children?

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In the Supreme Court of the United States

October Term, 1980

No. 81-119

Beverly Morrow, Individually and as Parent and Next Friend of Jane Ellen Morrow and James Andrew Morrow, and John Patrick Morrow, Petitioners

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF OF PETITIONERS

ARGUMENT

The petitioners limit their argument in this reply brief to those arguments first raised in the "Brief for the United States in Opposition" and which were not discussed in the Petition for Writ of Certiorari, as required by Rule 22.5 of this Court.

ISSUES ONE AND TWO

The Government's admission that the applicable regulations, 28 C.F.R. Section

32, were amended subsequent to the LEAA's decision to deny benefits to the widow and minor dependent children of Firefighter Morrow in this case is a compelling reason for granting the Writ. As the Government states in its brief (Gov. Br. 5), the regulations now provide procedures by which claimants for Public Safety Officer's Benefits can reopen the record to respond to evidence received post-hearing and ex parte by the hearing officer. However, the Government's self-serving argument that this amendment did not change the "actual practice" of the agency is contradicted by the record in this case. In fact, it is clear that the hearing officer in reaching her decision to deny benefits in this case relied on the opinions of Drs. Dixon and Thompson that were set forth in the June 13, 1978 letter of Dr. Dixon and June 14, 1978 letter of Dr. Thompson. Both of these opinions were rendered by these men prior to the time they received all of the evidence submitted by petitioners. The record is undisputed that the hearing officer did not rely on opinions of these men rendered after they received all of the material submitted by petitioners. (Record 8-20).

It is undisputed and the Government has conceded in its brief, that at the time of the decision by the agency in this case the regulations did not provide a procedure by which petitioners could meaningfully respond to the post-hearing evidence received by the hearing officer.

Further, at no time were petitioners or their counsel invited by the Agency to

reopen the record or submit evidence contrary to the opinions of the non-treating physicians, which, according to the Government's brief, was the "actual practice" of the agency.

Therefore, the "actual practice" of the agency in this case did violate the due process rights of petitioners by failing to provide them a meaningful opportunity to respond to the evidence received by the hearing officer after the hearing.

ISSUE THREE

The Government's attempt to rebut petitioners' contention that the decision below conflicts with the decision of this Court in Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842, (1971) and with the decisions of a number of Federal Courts of Appeal (Pet. p. 12) on the ground that the LEAA's decision was supported by the findings of the pathologist who conducted the autopsy, is a distinction without substance. This pathologist never treated Mrs. Morrow's husband and it is undisputed that every physician who did treat Mr. Morrow was of the opinion that the smoke inhalation he suffered was a "substantial factor" in his death.

Further, the "List of References" used by the hearing officer to support her decision to deny benefits to petitioners (R. 19) does not list the pathologist's record of autopsy as a source upon which she relied in reaching her decision. The only references to the autopsy are in Dr. Thompson's letter to the hearing officer

of June 14, 1978, (R. 41) in which he states that Firefighter Morrow's coronary arteriosclerosis was "well documented by autopsy," and in Dr. Dixon's letter of June 13, 1978, that states he considered the autopsy report in formulating his opinion. (R. 43).

Most important, the autopsy report itself (R. 137-140) states no conclusion or opinion whatsoever on the part of the pathologist in regard to whether or not smoke inhalation was a "substantial factor" or cause of Firefighter Morrow's death.

Clearly, the "findings of the pathologist who performed the autopsy" not only was not an opinion of a treating physician on the critical issue in this case, but also was not relied upon by the hearing officer in reaching her decision. Therefore, the Government's statement in Footnote 2 of its brief (Gov. Br. 6) that the "LEAA's decision was supported, not only by the reports of experts who reviewed the file, but also by the findings of the pathologist who performed the autopsy." is misleading and contrary to fact.

The contention of the Government that the Court of Claims "meant precisely the opposite" of what it said in its opinion in this case (Br. in Opp. 7) has already been discussed in the Petition at pages 20-22 thereof.

CONCLUSION

The Government has not shown any justification or excuse for the serious violations of the due process rights of the petitioners by the administrative agency in this case. Therefore, a Writ of Certiorari should issue to review the judgment and the opinion of the United States Court of Claims in this case.

Respectfully submitted,

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